Supreme Court, U.S.
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-12498
Non-Argument calendar

D.C. Docket No. 00-08862-CV-KLR

JOHN J. WALSH,

Plaintiff-Appellant,

Versus

SECRETARY OF THE DEPARTMENT OF INTERIOR,
Gale Norton,

Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Florida

(January 10, 2003)

Before BLACK, MARCUS, AND COX, Circuit Judges.

PER CURIAM:

John J. Walsh, proceeding pro se, appeals the district court's grant of summary judgment in favor of the Department of the Interior ("Department") on his failure-to-hire claim brought under 42 U.S.C. –2000e-16. Walsh claimed that the Department failed to hire him because of his race (white), sex (male), and age (over 40). The district court found that while there was a prima facie case of discrimination, Walsh failed to establish that the Department's legitimate non-discriminatory reason for failing to hire Walsh was pretextual. We affirm.

This court reviews a district court's grant of a motion for summary judgment de novo, viewing all evidence and factual inferences in the light most favorable to the nonmoving party. *Turnes v. Amsouth Bank, N.A.*, 36 F.3d 1057, 1060 (11th Cir. 1994). When the plaintiff relies upon circumstantial evidence to establish his claim in a Title VII discrimination case, the district court uses the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 4411 U.S 792, 802, 93 S. Ct. 1817, 1826 (1973). Under the framework, once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged action. *Id.* If the employer does so, then the burden shifts back to the plaintiff to establish that the proffered reason is pretextual, *Id.* at 804, 93 S. Ct. at 1825.

In this case, the Department conceded a prima facie case and then proffered a non-discriminatory reason for not hiring Walsh: he was not the most qualified candidate for the job. (See R.1-25 at Ex. 13 at 4, 7, 12.) Furthermore, Raquel Perez, the Personnel Management Specialist at the Everglades National Park, made a sworn statement that under either of the methods employed by the park to decide which applicants to forward to the selecting official for review,

Walsh failed to make the cut that would allow him to proceed. (R.1-25 at Ex. 6 at 12-14) In *Turnes,* we stated that an "employer need only offer admissible evidence sufficient to raise a genuine issue of fact as to whether it had a legitimate reason for not hiring the plaintiff." 36 F, 3d at 1061. We agree with the district court's conclusion that the Department established a legitimate, non-discriminatory reason for failing to hire Walsh.

Having established a legitimate, non-discriminatory reason for failing to hire Walsh, the burden shifts to Walsh to establish that the proffered reason is pretextual.

Walsh argues that he is more qualified than the younger, black female chosen for the position and that his superior qualifications establish pretext. When arguing that disparity in qualifications establishes pretext, we have stated that the plaintiff must "adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001), quoting *Denney v. City of Albany,* 247 F.3d 1172, 1187(11th Cir. 2001). We have examined the briefs and the record, and we do not find such a disparity in this case.

We affirm the district court's grant of summary judgment in favor of the Department. We deny Walsh's request that we grant declaratory relief and issue a writ of mandamus.

AFFIRMED.

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No. 00-8862-CV-RYSKAMP

JOHN J. WALSH,
Plaintiff,

-vs.-

GALE NORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,
Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE comes before the Court upon this Court" Order Granting Defendant" Motion for Summary Judgment. Considering this Court's order, an entry of final judgment is now appropriate. It is therefore

ORDERED AND ADJUDGED that **FINAL JUDGMENT** be and the same is **HEREBY ENTERED** for Defendant and against Plaintiff. The Clerk of the Court shall CLOSE **THE CASE** and **DENY** all pending motions as **MOOT.** This Court reserves jurisdiction to consider motions for attorneys fees and costs and any other post-judgment motion.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 8 day of March, 2002.

s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
Marilynn K. Lindsey, AUSA
John J. Walsh, pro se, 942 Marlin Circle, Jupiter, Fl.33458

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No. 00-8862-CV-RYSKAMP/VITUNAC

JOHN J. WALSH,
Plaintiff,

-vs-

GALE NORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,
Defendant
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE came before the court upon the Report and Recommendation [DE35] issued by Magistrate Judge Ann E. Vitunac on February 20, 2002.

The Court has considered the Report, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED THAT United States Magistrate Judge Ann E. Vitunac's Report and Recommendation [DE 35] is hereby **RATIFIED, AFFIRMED,** and **APPROVED.** Accordingly, Defendant's Motion for Summary Judgment [DE 25], filed December 3, 2001, is **GRANTED.** Final judgment shall be entered by separate order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, the 8 day of March, 2002.

S/_____
KENNETH L RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
The Honorable Anne Vitunac
Marilynn K.Lindsey, AUSA
John J. Walsh, pro se, by mail,
942 Marlin Circle, Jupiter, Fl. 33458

Appendix C/2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-8862-Civ-Ryskamp/Vitunac

JOHN J. WALSH, *pro se,*
Plaintiff,

Vs.

GALE NORTON,
SECRETARY OF THE DEPARTMENT
OF THE INTERIOR,
Defendant.
_____/

REPORT AND RECOMMENDATION ON THE MERITS OF PLAINTIFF'S CASE

THIS CAUSE is before the Court on an Order of Reference (DE 11) from District Judge Kenneth L. Ryskamp filed on October 31, 2000, directing this Court to "take all necessary and proper action required by law and/or submit a Report and Recommendation to this Court." Pending before the Court is Defendant's Motion for Summary Judgment (DE 25). This Court has reviewed the Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment filed December 21, 2001 (DE 27); Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment filed January 27, 2002 (DE 32). The matter is now ripe for review.

1. BACKGROUND

A. Plaintiff's Complaint

Appendix D

The Plaintiff's employment discrimination complaint (DE 1) alleges that he was discriminated against on the basis of race, gender and age. (Compl.at 2) In particular, the Plaintiff alleges that the Defendant engaged in discrimination by "unlawfully select[ing]...a measurably lesser qualified, and known to be prior to re-advertisement, non-qualified applicant of a different race, gender, and lesser, (under 40 years), age category" applicant for a concessions management position. (See id. at 3) The specific relief sought by the Plaintiff is that he be promoted and that the Defendant be enjoined from further acts of alleged discrimination. (See id at 4) In addition, the Plaintiff requests that the "current notorious profiled constituency placement program(s)...commonly known by the amorphous terms of Affirmative Action/Diversity/Special Emphasis" be "supplant[ed]" by "the Congressionally mandated, constitutionally sanctioned and individually oriented merit system and very limited Veteran's Readjustment principles and programs." (See id.)

B. Defendant's Motion for Summary Judgment

In its Motion for Summary Judgment (DE25), the Defendant argues that the Plaintiff has failed to rebut its legitimate non-discriminatory reasons for its employment decision. (M.S.J. at 14). The Defendant alleges that it is entitled to judgment as a matter of law because the Plaintiff, as the nonmoving party, fails to make a sufficient showing of an essential element to its claim of unlawful discrimination, to which he bears the ultimate responsibility under the Title VII burden shifting analysis. In particular, the Defendant argues that the Plaintiff fails to show that the proffered

reason for his non-selection was a pretext for unlawful discrimination. (See id. at 15.)

C. Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment

In Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment (DE 27), it is alleged that there are genuine issues of material fact precluding the entry of summary judgment. In support of his motion, the Plaintiff asserts that certain alleged "inconsistencies" in the record, coupled with an alleged "error" in the panel review process, constitute proof of an intent to discriminate. According tot he Plaintiff, the Defendant adhered to a broad based affirmative employment plan, that "alone and/or with prior introduced evidence" proved to be a pretextual, and ultimately dispositive, consideration.

D. Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment

In its Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment (DE 30), the Defendant asserts that the "inconsistencies" referenced by the Plaintiff are not actual inconsistencies and, in any event, do not satisfy his burden in demonstrating the existence of any issue of material fact. (Reply M.S,J. at 1) The Defendant alleges that the Plaintiff's arguments, taking singly or cumulatively, fail to create "even a scintilla of evidence" supporting his claim that the legitimate, non-discriminatory reasons proffered by the Defendant were a pretext for race, age and gender discrimination. (See id at 5.)

E. Plaintiff's Reply to Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment

In his Reply to Defendant's Reply to Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment (DE 32), the Plaintiff reiterates his previously raised arguments that genuine issues of material fact exist, thereby precluding summary judgment in favor of the Defendant.

II. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the court is to construe the evidence in the light most favorable tot he non-moving party. Arrington v. Cobb County, 139 F.3d865, 871 (11th Cir. 1998) Summary judgment can be entered only if it is shown "that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P.56[c].[1]

The Supreme Court has articulated the standard of review in summary judgment motions:

[T]he plain language of Rule 56[c] mandates the entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial. In such a situation, there can be no genuine issue as to any material fact, since the complete failure of

[1] Federal Rule of Civil Procedure 56[c] provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."

proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S.317, 322-23, 106 S.Ct. 2548 (1986).

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,'" that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex, 4767U.S. at 323, 106 S.Ct. 2548. Once this initial demonstration under Rule 56[c] is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his or her] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324, 106 S.Ct. 2548, see also Fed. R. Civ. P. 56(e). In meeting this burden the nonmoving party "must do more that simply show that there is a metaphysical doubt as the material facts." Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,86, 106 S.Ct. 1348 (1986). That party must demonstrate that there is a "genuine issue for trial." Fed. R. Civ. P. 56[c]. The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby Inc, 477 U.S. 242, 249-50, 106 S.Ct. 2505 (1986) (citations omitted). A dispute about a material fact is genuine if there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary may be granted."

Anderson, 477 U.S. at 249-50, 106 S.Ct. 2505. Although summary judgment should be granted with caution in employment discrimination cases, there are occasions when should disposition is appropriate. See, e.g., Theard v. Glaxo, 47 F.3d 676, 680 (4th Cir. 1995) ("Since the evidence was not sufficient for a reasonable jury to have concluded that Glaxo's decision not to promote Theard was wrongfully based on race, entry of summary judgment [for the employer] was justified.")

B. Title VII and ADEA

Under Title VII, it is unlawful "for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race...[or] sex." 42 U.S.C. ss2000e-2(a)(1). The Age Discrimination I Employment Act ("ADEA") proscribes similar treatment on the basis of age. See 29 U.S.C. ss623(a)(1).

Title VII liability based on disparate treatment requires proof of discriminatory intent either through direct or circumstantial evidence. See Equal Employment Opportunity Commission v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286(11thCir.2000)(citing Harris v. Shelby County Board of Education, 99 F.3d 1078, 1083(11th Cir. 1996)). In Title VII discrimination cases based on direct evidence, "the existence of discriminatory intent behind the employment decision [arises] without any inference or presumption." Standard v. A.B.E.L. Servs.Inc. 161 F.3d 1318, 1330 (11thCir.1998). In contrast, in title VII discrimination claim based on circumstantial evidence, a plaintiff must prove discriminatory motive under a burden-shifting framework.

See International Brotherhood of Teamsters v. United States, 431 U.S. 324,335n. 15,97 S.Ct. 1843, 1854n, 15(1977). Under this analysis, the Plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. See Texas Dep't Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981). In order to establish a prima facie case of failure to promote a Plaintiff must show that: "(1) that he is a member of a [protected class; (2) that he was qualified for and applied for the promotion; (3) that he was rejected; and (4) that other equally or less qualified employees who were not members of the protected class were promoted."
Combs v. Plantation Patterns, 106 F.3d 1519, 1539n. 11 (11th Cir. 1997) citing Wu v. Thomas 847 F. 2d 1480, 1483 (11th Cir. 1988)).

One the Plaintiff proves this prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. See Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997) (citing Burdine, 450 U.S. at 248). If this requirement is met, the Plaintiff bears the ultimate burden of proving the reason to be a pretext for unlawful discrimination. See id. at 1565; Combs, 106 F 3d at 1528.

The burden shifting framework applicable to Title Vii claims based on circumstantial evidence also applies to claims of discrimination under the ADEA. See Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268 n. 6 (11th Cir. 2001) (internal citations omitted).

111. ANALYSIS

A. Whether the Plaintiff establishes a prima facie case of discrimination

In his Employment Discrimination Complaint, the Plaintiff alleges that the Defendant discriminated against him based on his race, gender, and age, by "unlawfully select[ing]" a "measurably lesser qualified" applicant for a merit promotion position as a concessions management specialist. (Compl. At 3.) Defendant concedes that the Plaintiff satisfies his initial burden of establishing a prima facie case based on race, gender, and age discrimination. (M.S. J. at 15.) In particular, the accepted allegation for the investigation and processing of Plaintiff's complaint was as follows:

You were discriminated against on the bases of race (white), sex(male) and age (over 40) when you were not selected for the position of Concessions Management Specialist, GS-1101-05/07/09, vacancy announcement number Ever-97-15, at Everglades National Park. (You became aware in November of 1997). (M.S.J. Ex. 5 at1). Plaintiff is a white male who was forty-seven (47) years old at the time of his alleged claim of discrimination. He applied for a concessions management specialist position originally advertised at the GS-1101-07/09 level. (M.S.J.Ex. 10 at 1-5) Only two applicants, the Plaintiff and Patricia Goodman, a white female over 40 years of age, met the minimum qualifications at this level. (M.S.J. Ex. 12 at 1.) Said position was re-advertised at the GS-05/07/09 level. (M.S.J. Ex. 10 at 7) The position was re-advertised in order to increase the pool of eligible candidates. (Perez 9/15/98 Dep. At 4-5) The promotion eligible candidates were ranked by a three member rating panel consisting of Peter Allen (white, male, age unknown), Louis Penna (Hispanic, male, over 40 years of

age), and Monte Camp (white, male, over 40 years of age). (Perez 9/15/98 Dep. At 5) The candidate ultimately selected is a black female under the age of 40. (M.S.J. at para. 8.)

B. Whether the Defendant articulates a legitimate, non-discriminatory reason for Plaintiff's non-selection

Once a Plaintiff establishes a prima facie case of discrimination, the burden shifts to the Defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. See Holifield, 115 F. 3d at 1564. The Defendant, while conceding that the plaintiff establishes a prima facie case of discrimination, contends that it has articulated legitimate, non-discriminatory reasons for his non-selection. (M.S.J. at 15) In particular, the Defendant claims that Plaintiff's non-selection was based entirely on an objective rating procedure utilized to assess all candidates equally. (M.S.J. at 18)

According to Henry C. Benedetti, the selecting official responsible for making the ultimate hiring decision, Cherri Brice was chosen because of her superior background and specific job related experience. (Benedetti 9/15/98 Dep. At 6.) In particular, Benedetti states that Brice's experience with incidental business permits and concessions contracts, coupled with her insurance industry background and visitor experience, provided the basis for her selection. (Benedetti 9/15/98 Dep. At 6-8) Benedetti states that race, gender and age were non-factors in the selection review process. (Benedetti 9/15/98) Dep. At 8-9.)

Raquel Perez, the Personnel Management Specialist responsible for processing the concessions management vacancy announcement, states the position was advertised at the 7/9 grade level, but later re-advertised at the 5/7/9 level in order attract a larger pool of applicants. (Perez 9/15/98 Dep. At 4.) Perez states that the Plaintiff's application was not processed for further review because his rank and rating

under both the "natural" and "average" cutoff methods rendered him ineligible for referral to the selecting official. (Perez 9/15/98 Dep. at 14.) In addition, Perez states that information pertaining to each applicant's race, sex and age did not factor in their rating and evaluation. (Perez 9/15/98 Dep. At 16)

Monte D. Camp, one of the three panelists, states that the applicants' qualifications were individually assessed. (Camp 9/15/98 Dep. At 4.) Camp states that the panel did not convene until after the applicants were all evaluated. (Camp 9/15/98 Dep. At 4.) Camp states that the panel gave no consideration to race, sex or age in the review process. (Camp 9/15/98 Dep. At 4) Camp neither conferred with the Plaintiff nor with the selecting official prior to the ultimate selection. (Camp 9/15/98 Dep. At 4.)

Valerie Proctor, Personnel Officer at Everglades National Park, met with the Plaintiff to discuss his non-selection. (Proctor 10/30/98 Dep. At 4.) Proctor alleges that a procedural error was made in the applicant review process and the panel should not have convened in order to rate the fewer than ten promotion eligible candidates. (Proctor 10/30/98 Dep.At 7.) However, Proctor states that neither race, sex or age played any role in the evaluation process. (Proctor 10/30/98 Dep. At 8) Proctor states that "as a corrective action" for the alleged error, the Plaintiff was offered an informal resolution agreement wherein he was offered priority consideration for the next available concessions management position. (Proctor 10/30/98 Dep. at 6.)

The informal resolution agreement was reduced to writing and presented to the Plaintiff on March 18, 1998. (M.S.J.Ex.20 at4-6.) The specifics of the offer were that the Plaintiff would be afforded priority consideration for the next concessions management specialist position at Everglades

National Park at the GS-1101-5/6/9 and GS-1101-12 levels. (M.S.J.Ex.20at 4-5.) Under this framework, the supervisors would be under an affirmative obligation to fully document their reasons in the event the Plaintiff were not selected. (M.S.J.Ex.20at4.) The Plaintiff rejected this offer and instead submitted his own "counter offer" on March 23, 1998.[2] (M.S.J. Ex. 1 at 10-11.)

On January 12, 1998, Proctor wrote a letter to the Plaintiff detailing the process in evaluating applicants for the concessions management position. (M.S.J. Ex. 20at1-3.) In the letter, it is explained that all applicants were rated and ranked according to their relative scores on the four "knowledges, skills and abilities [KSA's]." In particular, the KSAs were identified as follows:

(1)knowledge of the guidelines for handling incidental business permits, limited use permits, and concessions permits;(2)knowledge of concessions contract administration principles and practices to monitor concessioner performance and solve problems; (3)ability to review and analyze concessioner rate requests and prepare recommendations for approval/disapproval (address your experience performing rate comparability studies); and (4) ability to communicate orally and in writing (address your experience interpreting concessions management guidelines; investigating complaints and preparing replies; monitoring and reviewing concessions.(M.S.J. Ex. 20 at 1-2.)

Each KSA had five possible point totals which ranged from 0 points for "No evidence of KSA" to the highest score for "Experience at Level 4." The first three KSAs had a weight factor of 5, while the fourth KSA had a weight factor of 4.

[2] The specific relief requested by the Plaintiff was that he be "considered to be equal to and thus treated as a member of any and all groups that receive the benefit of Affirmative Action programs for purposes of hiring, training, retention and upward mobility opportunities."

Each panel member was required to individually list the KSAs on a separate evaluation summary. The procedure used to refer the top ranking promotion eligible candidates to the selecting official undertook two distinct approaches. Under the "natural break" cutoff method, a score was established at the greatest differential between two consecutive candidates. Under the "average break" method, the cutoff point equaled or exceeded the total of all the KSAs at Level 3.

Significantly, under both methods, the Plaintiff failed to establish the requisite rank necessary to qualify for further review. The evaluation summaries indicate that there were eight qualified applicants for the position at the GS-5 who were referred to the three-member panel. (M.S.J. Ex. 12)

Of the eight candidates reviewed by the panel, the Plaintiff ranked number four and was not referred to the selecting official.[3] The Plaintiff received an averaged score of 44 from the respective panelists, placing him beneath the cutoff scores under each distinct ranking method considered by the Defendant. (M.S.J. Ex. 13 at 3) Under the "natural break" approach, the cutoff points occurred between candidate Linda Nommensen's average score of 54 and the Plaintiff's average of 44. Under the "average break" method, the cutoff point occurred at a rating that equaled or exceeded the total of all the KSAs at Level 3, which corresponded to a score of 57. The National Park Service utilized the "natural break" method as this formulated a greater applicant pool from which to make its selection. In contrast to the Plaintiff's mid-ranking score, the selectee received the highest rank at the GS-5 level from all panelists.(M.S.J. Ex. 13 at 4,7,and 10)

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[3] The promotion eligible candidates rated and ranked by the panel included George Bell, Lisa M. Bourne, Cherrie a. Brice, Leon L. Daniels, Harriet D. Freeman, Joseph L. Herring, Linda L. Nommensen and John J. Walsh.

In commenting on the Plaintiff's relative qualifications and job experience, panelist Peter Allen stated that he had "[n] o experience in NPS, concessions, hospitality." In contrast, Brice, who received 24 more points than Plaintiff, had "[g]od agency customer service exp.-some concessions exp." (M.S.J. Ex. 13 at 7.) Finally, panelist Louis Penna, who did not provide comments, nevertheless rated Brice 26 points higher than the Plaintiff. 9M.s.j. Ex. 13 at 10.) After these evaluations were completed, each competitive eligible candidate's numbers were averaged in order to arrive at a final ranking. The scores were 64;58; 54;44;43;41;34; and 27. M.S.J. Ex. 13 at 13.) The Plaintiff's score of 44 placed him beneath the cutoff point under the "natural break" as well as "average break" methodological approaches. The Plaintiff's ranking also rendered him ineligible for consideration at the GS-6 and GS-7 levels. (M.S.J. Ex. 13 at 14.)

Under these particular facts, the Defendant has met is burden in articulating a legitimate, non-discriminatory reason for Plaintiff's non-selection. Based on an objective evaluation, one that applied equally to all promotion eligible candidates, the Plaintiff's numerical rating placed him beneath the cutoff for certification. As explained by the Eleventh Circuit, "it is not the role of federal courts to second-guess the hiring decisions of business entities." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th cir. 1984). Indeed, the proffered reason by an employer ""does not have to be a reason that the judge or jurors would act on or approve" but rather must simply be one that is non-discriminatory in nature. Id. (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n. 6(1st Cir. 1979). The Defendant sufficiently demonstrates that the Plaintiff's non-selection was based on legitimate, non-discriminatory reasons.

C. Whether the Plaintiff has shown pretext sufficient to demonstrate a genuine issue of material fact as to the veracity of the employer's legitimate, non-discriminatory reasons.

Where, as here, the Defendant produces a legitimate, non-discriminatory reason for the challenged employment action, the Plaintiff bears the ultimate burden of proving the proffered reason to be a pretext for unlawful discrimination. See Burdine, 450 U.S. at 256, 101 S.Ct. at 1095.

In the instant case, the Plaintiff offers no direct proof to support his title VII discrimination claim. Instead, he relies of circumstantial evidence in the form of "inconsistencies" in the record and a disputed irregularity in the selection process, to support his claim of pretext. First, the Plaintiff contends that his rebuttal testimony was not referenced in the Defendant's motion for summary judgment, and that therefore an issue of material fact arises.[4] The Plaintiff alleges that the "circumstances", "definition" and "context" of the term "selecting official" evidences an additional factual issue. (See id. at 3-4.) The Plaintiff alleges that Benedetti's testimony is inconsistent as to whether he reviewed each application. (See id. at 4.) According to the Plaintiff, an additional material issue arises because the Defendant failed to specifically reference his June 5, 2001, deposition testimony. (See id. at 5) the Plaintiff indicates that language contained in a letter sent to him on January 12, 1998, from Everglades National Park, further evidences an issue of material fact.[5] As the Plaintiff

[4] Plaintiff's Motion for Denial of Defendant's Motion for Summary Judgment at 1-2.

[5] In particular, the Plaintiff references Step 4 of the applicant review process which provides that: "In determining which candidates to refer to the selecting official, a cut score was established (refer to attachments 5 and 6). If one method screens out minorities, women, or other targeted groups, the alternative method is used." (M.S.J. Ex. 20 at 2)

sees it, evidence of pretext is found by the "totality of the circumstances" coupled with his own testimony that the selecting officials' "adherence to diversity is a very important factor." (See id. at 6-7) According to the Plaintiff, an additional issue of material fact arises because of his own disbelief that "numerous ENP" personnel indicated that neither race, nor any affirmative action plan factored in his non-selection. (See id. at 7) In addition, the Plaintiff states that since one of the panel members, Monte D. Camp, rated him higher than the other panelists, this evidences his eligibility for referral, or, in the alternative, placement on the certification list. (See id. at 8.) Next, the Plaintiff cites as evidence of pretext the fact that panelist Penna provided no comments as to his particular qualifications, and that therefore an "adverse inference" was created. (See id. at 10.) Plaintiff maintains that the panel review process was inherently flawed as evidenced by the "apparently false" signatures on the evaluation summaries. (See id.) As additional "proof" that material issues of fact exist, the Plaintiff alleges that by not including his name for certification to the selecting official, this effectively constituted a "rejection" of his application. (See id at 11.) Plaintiff further contends that the Defendant implemented an Affirmative Employment Plan "policy" designed to specifically favor minority applicants (See id at 12-13) Finally, the Plaintiff argues that an issue of material fact is present because the Defendant allegedly failed to comport with EEOC guidelines on employee selection procedures. (See id. at 13-14.)

Plaintiff's argument regarding "inconsistencies" in the record is unconvincing. The Plaintiff fails to provide evidence of pretext. The fact that the Defendant did not reference Plaintiff's rebuttal testimony, or his June 5, 2001, deposition testimony, does not conclusively demonstrate the existence of material fact. Notably, the Plaintiff fails to state what

portion, if any, of this testimony would refute the veracity of the Defendant's legitimate, non-discriminatory reasons. The Plaintiff's challenge to the identity of the "selecting official" is similarly unavailing given that his non-selection was done entirely by the reviewing panel. (M.S.J. Ex. 13 at 13.) Benedetti's initial testimony that he "reviewed the applications submitted to him and interviewed each applicant" is entirely consistent with his later that he did not have access to the applications. This evidence simply denotes that Benedetti did not review the application of the Plaintiff, or any other person whose name was not on the certificate list. (Reply M.S.J. Ex. 1.) Plaintiff's allegation that there is no evidence of "numerous ENP personnel" stating that neither race, nor any affirmative action plan factored in the decision process, is also refuted by the record. (Benedetti 9/15/98 Dep. at 8-9; Perez 9/15/98 Dep. at 15; Camp 9/15/98 Dep. at 9; Proctor 10/30/98 Dep. at 8.) The Plaintiff's argument concerning the relative disparity in the score given to him by Monte D. Camp and those given by the other panelists, provides an insufficient basis upon which to infer discrimination. The Plaintiff's uncontroverted average score of 44 rendered him ineligible for further consideration under both cutoff scores considered by the Defendant. (M.S.J. Ex. 13 at 13.) The Plaintiff fails to show how the lack of commentary from panelist Penna as to his particular qualifications creates an "adverse inference", much less support for a claim of unlawful discrimination. It is undisputed that Penna provided no comments as to any of the promotion eligible candidates. (M.S.J. Ex. 13 at 10.)

Likewise, the Plaintiff fails to show how the "apparently false" signatures on the evaluation summaries present any evidence that he was treated, or his skills ere assessed, any differently from any of the other candidates. In particular, the documents referenced by the Plaintiff all

correspond to the evaluation summary completed by Personnelist Raquel Perez, who apparently wrote the names of the panelists in the space providing for their signatures. (M.S.J. Ex. 13 at 1,2,3, and 13.) However, Perez was not one of the three panelists involved in the actual evaluation process. It is undisputed that the numerical ratings given by the panelists correspond to the final ranking as reported in the evaluation summary by Perez. Accordingly, the Plaintiff fails to show that the "apparently false" signatures on the evaluation summary gives rise to an issue of material fact.

Concerning Plaintiff's argument that an affirmative employment plan was used in his particular employment decision, there is no evidence from which a rational fact finder could conclude that the proffered reason for his non-selection; i.e., that Brice possessed superior qualifications based on objective criteria, was in fact based upon a policy designed to discriminate against white males over the age of 40. The Plaintiff asserts that not including his name in the certification to the selecting official "unlawfully disfavor[ed] against him. However, even assuming arguendo that a procedural error was made and that the panel should not have convened, the Plaintiff fails to show that the Defendant acted with discriminatory intent. The Defendant's effective policy regarding the rating/ranking of each applicant is stated as follows: All applicants will be rated to ensure that they meet the qualification requirements, as described in the vacancy announcement. Applicants must meet all qualification requirements by the closing date of the announcement. Regardless of the number of applicants, qualitative distinctions must be made among the promotion eligible in terms of relative merit and ability. (M.S.J. Ex. 21 at 4) (emphasis added)

The Defendant indicates that the rating procedure continues as follows:

"If there are more than 10 candidates eligible, a formal rating schedule must be developed or an automated ranking process will be used. Use of a rating/ranking panel is optional...If there are 10 or fewer [candidates], a determination as to "well qualified" must be made."[6] (M.S.J. at 8, n. 5)

Even assuming that the Defendant erred in convening a panel to review the eight promotion eligible candidates, this alleged deficiency affected all candidates equally and Plaintiff fails to demonstrate that such action was a pretext for unlawful discrimination. See, e.g., Langerman v. Thompson, 155 F. Supp.2d 490,498 (D.Md.2001) ("To the extent any deficiencies in the selection process existed...[t]here is absolutely no evidence that the selection process was designed to, or in fact did, discriminate against white men in general or Plaintiff in particular because he is a white male.");see also, Mitchell v USBI Company, 186 F. 3d. 1352, 1355-56(11th Cir. 1999) ("Standing alone, deviation from a company policy does not demonstrate discriminatory animus.") Finally, Plaintiff's conclusory allegation that his non-selection establishes a violation of the Equal Employment Opportunity Commission's "Uniform Guidelines Selection Procedures" is wholly devoid of evidentiary support.

The Plaintiff has not met his burden in proving the Defendant's legitimate, non-discriminatory reasons pretextual for unlawful discrimination. Plaintiff has neither produced evidence nor designated specific facts which, if submitted to a jury, would show the existence of material issues of fact that the Defendant acted with discriminatory intent. This Court has examined all of the evidence presented by the Plaintiff, and considering the evidence in the light most favorable to the nonmoving party, this Court finds there

[6] The referenced text was not however produced for this Court's review and appears to have been inadvertently omitted.

to be no genuine issue of material fact as to whether the Defendant discriminated against the Plaintiff. The Plaintiff has failed to produce any affidavits, depositions, answers to interrogatories, or admissions tending to support a reasonable jury verdict in his favor. Thus, based on the merits of Plaintiff's case, the Court concludes that the Defendant is entitled to summary judgment.

IV. RECOMMENDATION

For these reasons, it is hereby RECOMMENDED as follows: (1)Defendant's Motion for Summary Judgment (DE25) should be GRANTED.

Any party may serve and file written objections to this Report and Recommendation with the Honorable Kenneth L Ryskamp, within ten (10) days after being served with a copy. See 28 U.S.C.ss636(b)(!)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. See United States v. Warren, 687 F 2d 347, 3348 (11th Cir. 1982) cert denied, 460 U.S. 1087 (1983).

DONE AND RECOMMENDED in Chambers at West Palm Beach in the Southern District of Florida, this 20 day of February, 2002.

S/_____
ANN E. VITUNAC
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Kenneth L. Ryskamp
John J. Walsh, pro se
Marilynn K. Lindsey, AUSA (Ft. Lauderdale)

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12498-HH

JOHN J. WALSH,

Plaintiff-Appellant

Versus

SECRETARY OF THE DEPARTMENT OF INTERIOR,
Gale Norton,

Defendant-Appellee

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, _____F.2d____).

Before: BLACK, MARCUS, and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

S/_____
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

IN REPLY REFER TO:
FNP-98-080

Mr. John J. Walsh
942 Marlin Circle
Jupiter, Fl. 33458

Dear Mr. Walsh:

This is to reference to the complaint of discrimination you filed against the Department of Interior (DOI), National Park Service (NPS), Everglades National Park, Homestead, Florida, case no. FNP-98-075, March 23, 1998. By letter dated June 5, 1998, the following allegation was accepted for processing:

> You believe you were discriminated against on the bases of race(White), sex(male), and age(over40) when you were not selected for the position of Concessions Management Specialist, GS-1101-05/07/09, vacancy announcement number EVER-97-15, at Everglades National Park. (You became aware in November 1997)

BACKGROUND

The record shows that you contacted the EEO Counselor on December17, 1997. The EEO Counselor was unsuccessful at resolving your complaint and March 23, 1998, you received the Notice of Final Interview/Right to File a Complaint letter. As stated, you filed your formal complaint on that same date, after which it was accepted by the NPS Office for Equal Opportunity. Your complaint was investigated during the period August 25 through November 11, 1998. The record reveals that you have not requested a final agency decision. Therefore, we are issuing the final agency decision on the merits of your complaint.

Accordingly, we have analyzed the entire complaint file, including the Report of Investigation(ROI). Based on our review, we have prepared the following analysis which explains the DOI's final decision regarding you complaint.

LEGAL STANDARD

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court established a procedure for analyzing claims of discrimination brought under Title VII. The Court stated that the Complainant "must carry the initial burden under the statute of establishing a prima facie case of discrimination." Id, at 802. The burden than shifts to "the employer to articulate some legitimate, nondiscriminatory reason" for its action. Finally, the complainant must be "afforded a fair opportunity to show that the employer's stated reason for [the action] was, in fact, pretext." Id, at 804. The burden of persuading the fact finder that the employer intentionally discriminated against him or her

remains with the Complainant through all stages of proof, to be satisfied by a preponderance of the evidence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)

With respect to you charge of age discrimination, the courts traditionally apply the same evidentiary framework for Age Discrimination in Employment Act (ADEA) cases as has evolved in the context of Title VII discrimination cases. The Complainant must show that he/she is being treated less favorably than a younger employee. The ultimate burden in an age discrimination case requires the Complainant to prove that age was a "determining factor" in the challenged employment decision. Cuddy V. Carmen, 694 F2d 853, 858, n.23 (D.C. Cir. 1982). In other words, age must make a difference in the employer" action; "but for" age discrimination, the employment decision at issue would not have occurred.

You are alleging discrimination based on sex, race, and age when you were not selected for the position of Concessions Management Specialist, GS-1101-5/7/9, advertised under vacancy announcement number EVER-97-15 at Everglades National Park. As stated, you must first establish a prima facie case sufficient to justify an inference of discrimination. A prima facie case in your allegation of discrimination in non-selection for the position at issue can be established by showing that: (1) you are a ember of protected group under Title VII and the ADEA; (2) you applied and were qualified for the position in question; (3) you were not selected; and (4) an individual not of your protected group was selected for the position.

DISCUSSION AND ANALYSIS

You state that, during the period relevant to your complaint, you held the position of Motor vehicle Operator, WG-5073-5, at Hobe Sound National Wildlife Refuge, U.S. Fish and Wildlife Service (FWS), Hobe Sound, Florida. You state that you became aware of a vacancy for the position of concessions Management Specialist, GS-1101-5/7/9, with the NPS, advertised on March 27, 1997, under vacancy announcement number EVER-97-1, and submitted your application. The record also shows that a rating and ranking panel was convened and three (3) candidates were referred as the best qualified to the selecting official for consideration. On August 27, 1997, Cherrie Brice, (Black, female, DOB: 10-31-62) was selected for the position.

Prima Facie Case

With respect to your allegation of discrimination based on sex, race and age, the record shows that you are a member of a protected group because of your race (White), sex (male), and age (48). You applied and were qualified for The Concessions Management Specialist position advertised by the NPS. However, you were not selected and person outside your race, sex and age was selected. Therefore, you established a prima facie case of discrimination on these bases.

Once a Complainant establishes a prima facie case of discrimination, the burden of proof shifts to the Department to articulate a legitimate, nondiscriminatory reason(s) for the complained of action(s).

Management's Articulated Reason

The selecting official, Henry C. Benedetti (White, male, age 58), Chief, Concessions Management, states that your name did not appear on any of the certificates referred to him for consideration. He states that he had no involvement with the rating or ranking of candidates, or with the rating panel that reviewed the applicants' qualifications. Mr. Benedetti states that the selectee was chosen because of her prior experience and background with the NPS. He said his decision was not based on affirmative action considerations, and that race, sex and age were not factors in his selection decision (Exhibit 5).

Monte D. Camp, (White, male, age 52), contracting Officer, was a panel member who evaluated the qualifications of the applicants for the position at issue. He said each panel member individually rated each applicant's qualifications, and then the panel was guided by a personnel specialist to reconcile the scoring. Mr. Camp stated that he rated your qualifications at the GS-5, 6, and 7 grade levels. He said your application reflected a very general background-having been in business for yourself-that was similar to the experience for the position in question. However, he said your background did not demonstrate the specific experience required in the Knowledge, Skills and Abilities (KSAs). He said sex, race and age were not factors in the evaluation of the applicants' qualifications. (Exhibit 6)

The record reveals that two other panel members, Mr. Peter Allen and Mr. Louis Pena, are no longer employed with the agency.

Raquel Perez (Hispanic, female, age 34), Personnel Management Specialist, GS-11, stated that she was

responsible for processing the vacancy announcement, reviewed the applications to insure that minimum qualifications were met, and issued the promotion certificates to the selecting official. Ms. Perez stated that the position was initially advertised at the GS-7/9 grade level and later re-advertised at the GS-5/7/9 grade level in order to increase the applicant pool. She said the applications of the candidates who met the minimum qualifications were presented to a three-member panel. Each panel member rated each applicant individually, and than a consensus was reached. Ms. Perez stated that your score of 44 was below the cutoff scores for the GS-5 level (the average break was 57 and the natural break was 54). Ms. Perez stated that your name was not referred on the certificate at any grade level because you did not make the cutoff score. She said that you were the only candidate for the GS-6 and GS-7 levels, and no candidate qualified for the GS-9 level. Ms. Perez affirmed that no consideration was given to race, sex or age in the rating process.

Ms. Perez said she had discussions with you regarding your consideration for the position. She said you were told that you were not referred for final consideration because your scores were lower than the cutoff scores. She said you were informed that you did not meet the minimum qualifications for the position, and, therefore, your name was not recommended for further consideration. (Exhibit 7)

Based on the above witnesses' statements, management has articulated legitimate, nondiscriminatory reasons for their selection decision. The burden now returns to you to establish by a preponderance of the evidence, that the reasons are a pretexts for unlawful discrimination.

Pretext

In your rebuttal you point out several inconsistencies in Mr. Benedetti's affidavit, particularly in the manner in which M. Benedetti answered the questions of the investigator. However, your questioning Mr. Benedetti's answers do not indicate pretext for discrimination. You showed no discrepancies or contradictions of testimony as it relates to the facts of this case.

You also stated that you had previously been found to qualify for the same position at the GS-9 level with the NP and that you scored 99% and 96% on two separate and related OPM qualifying tests for the same position. You admit that the test was discontinued after 1995 as a result of a pre-trial settlement entered into by minority group members who alleged the test was biased against them. However, the record shows no relevancy of your previous ratings by OPM and your application for the subject position with the NPS. The record does show that you were qualified for the position at the GS-5 and 7 levels. The record does not show that you were better qualified than other candidates bases on your previous OPM ratings.

You aver that the selection process was predicated on affirmative action considerations. (Exhibit 8) You stated that you believed the selecting official had performance standards concerning affirmative action quotas that disfavored "eligible non-preferenced males." The record does not contain any evidence that affirmative action was a consideration in this selection process. In fact, all agency officials involved in the selection process affirmed that no consideration was given to race, sex or age. Mr. Benedetti, the selecting stated that he was not under any pressure to hire minorities and/or females for the position. (Exhibit 5, pg. 8)

It is noted that a question was raised regarding the use of a rating panel for this position because there were less than ten candidates. Valerie A. Proctor (White, female, age 43), Personnel Officer, GS-13, stated that, although she was not involved in the selection process for the position at issue, the Merit Promotion Plan does state that rating and ranking of candidates is not required when there are fewer than ten promotion-eligible candidates. She states that this was an "error" and all eight eligible candidates, including you, should have been referred to the selecting official for consideration. Ms. Proctor states that your name would have been referred to the selecting official if the error had not been made.[1] She said no consideration was given to race, sex or age as a result of the error that was made regarding your consideration for the position at issue. The record shows that the panel referred three candidates to the selecting official (3 female, 1 Black, 2 race not identified, ages 35, 35 and 44). Five candidates scored below the cutoff point and were not referred to the selecting official (4 male, 1 female, race not identified, ages 39, 40, 42, 47, and 49). Exhibit 9; 13, 14)

The DOI Merit Promotion Plan guidance date February 8, 1996, states, as it relates to panels, the following:

> Q. What rating/ranking procedures should be followed prior to the referral of applicants for selection consideration?
>
> A. "...Regardless of the number of applicants, qualitative distinctions must be made among the

[1] Ms. Proctor stated that during EEO counseling, an the informal resolution offer was made to you priority consideration for the next available Concessions Management Specialist vacancy. Ms. Proctor said that you declined to accept the informal resolution agreement.

> promotion eligible in terms of relative merit and ability. If there are more than 10 candidates eligible for promotion, a formal rating schedule must be developed or an automated ranking process will be used. Use of a rating/raking panel is optional...If there are 10 or fewer promotional candidates, a determination as to the "well qualified" must be made...Rating and ranking decisions must be documented and kept in a case file..." (Exhibit 21)

Based on the above, it does not appear that the NPS erred when they held a panel the eight applicants. Regardless of the number of candidate, the NPS was required to address the qualifications of the candidates prior to referral to the selection official. In this case, a panel was convened. As stated above, nothing in the record demonstrates that the rating of the applicants was motivated by unlawful discrimination.

You state that your are convinced that, had you been referred, you would have been selected because of your experience. Your contention, however, is speculative and without support. There is no evidence in the record that would indicate that you would have been the selectee.

The evidence indicates the qualifications of the selected candidate are consistent with the reasons articulated by the selecting official as the reasons for her selection, I.W., prior experience with the NPS and directly relevant experience with KSAs identified in the vacancy announcement. The selectee was the highest scoring candidate at the GS-5 level. The record shows that your application was not assessed as

high as the selectee's application. You have not produced b a preponderance of the evidence that the reasons articulated by the NPS management officials were pretext for unlawful discrimination.

CONCLUSIONS AND FINDINGS

Bases on the above analysis, it is the decision of the Department of the Interior that you were not discriminated against based on your race, sex, or age when you were not selected for the position of Concessions Management Specialist, GS-1101-5/7/9. Therefore, no remedies or attorney's fees are warranted. This notice is the final agency decision regarding your complaint. If you are dissatisfied with the decision, you have the following appeal rights:

APPEAL RIGHTS

You may file an appeal with the Equal Employment Opportunity Commission with 30 calendar days of receipt of this decision. The 30-day period for filing an appeal begins on the day after the date of receipt of this decision. The appeal shall be considered timely if it is delivered in person, by facsimile or postmarked before the expiration of the applicable filing period. In the absence of a legible postmark, the appeal will be considered timely if it is received by mail within five days of the expiration of the applicable filing period.

Appeals to the Commissions should be forwarded to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036, with a copy to this Office. You may also hand-deliver the appeal to the commission, Office of Federal Operations at 1801 L Street, NW, Washington, D.C. or by fax at (202) 663-7022. Any statement or brief in support of your appeal must be submitted to the Commission with a copy to this Office within 30 days of filing the Notice of Appeal.

CIVIL ACTIONS

In lieu of an appeal to the Commission, you may file a civil action in an appropriate United States District Court within 90 calendar days of receipt of the final decision.

If you file an appeal with the Commission, and you are not satisfied with the Commission's decision, you may file a civil action in a United States District Court within 90 calendar days of receipt of the Commission's final decision.

You may also file a civil action any time after 180 calendar days from the date of filing an appeal with the Commission, if there has been no final decision by the Commission.

Upon request of the complainant, the Civil Rights Act and the Rehabilitation Act give the Court discretionary authority to appoint an attorney without payment of fees or costs by the you. The grant or denial of your request is within the sole discretion of the Court. Your request and the civil action must be filed within 90 days of the date the final decision is received. Please note that the Age Discrimination in Employment Act contains no specific provision for a court-appointed attorney.

If you file a civil action involving this complaint, you must specifically name the Secretary of the Department of the Interior, Bruce Babbitt, as defendant. Failure to do so may result in the loss of any judicial redress to which you may be entitled.

It is important to note that 29 C.F.R. Section 1614.410 states, "Filing of a civil action under 1614.408 or 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing."

Sincerely,
S/_____

E. Melodee Smith
Director, Office of Equal Opportunity

Enclosure-EEOC Appeal Form

Cc: Dianne Spriggs, EEO Officer, NPS
Robert Walter, Assistant Solicitor, General Law

The constitutional provisions, treaties, statutes and regulations involved in the case with appropriate citation and reference to the petition are as follows:

1.) The Constitution of the United States including Article 1 Section 8,
[14] "To make Rules for the Government..." (at 5)
[18] "To make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers,..." (at 5)
Section 9,
[3] "No Bill of Attainder or ex post facto law shall be passed." (at 9, 10, 2)
[8] "No Title of Nobility shall be granted by the United States..." Article III (at 10, 27, 3)
[2] "...no attainder...shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained. (at 2, 3, 10)

Article VI:

[2] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof,...shall be the supreme law of the land..." (at 5)

Amendment(s) V:
"No person shall...be deprived of ...liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation."
VII: "in suits of common law...the right of trial by jury shall be preserved..." (at 26, 27)
IX: "The enumeration in the Constitution, of certain rights, shall not construed to deny or disparage others retained by the people."

X: "The powers not delegated to the United States by the Constitution…are reserved…to the people."
XIV: "'due process of law' nor deny equal protection of the laws."(at 5, 13, 14, 16, 17, 20, 22, 23, 30, 2)

2.) The United Nations treaty/agreement of 1949 entitled: "The Universal Declaration of Human Rights" and as contained therein:
Article 1. All human beings are born free and equal in dignity and rights…
Article 2. Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status…(at 30)
Article 23. (1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work…"

Moreover, the United Nations has specifically disallowed the payment of reparations as a means to "settle old scores" that stem from past relations. This is also to state that preferences, as based on proscribed factors, are undeniably a form of reparations, whose affects are unduly concentrated on the non-influential, non-connected, and non-moneyed segment of the non-preferred so called protected class of non-minority males. Such is particularly relevant as pertaining to the Federal actors competitive civil service component as statistical analysis reveals. (at 2, 3, 4)

3.) Pertinent statutes and regulations include but are not limited to the following:
1. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A./2000e-2. (a), 29 U.S.C.A./621-634, Amendments of 1972 to Title VII by which Congress extended the protections of Title VII to the Federal Government,

the Pendleton Act-5 U.S.C.A./1101-1105 (1966) Civil Service Reform Act (CSRA) of 1978, Pub. L. No. 95-454, 92 Stat.IIII (codified in sections of 5, 10, 15, 28, 31, 38, 39, and 42 U.S.C.A.) (at 3)

2. UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES: 29 CFR 1007. 1-18, 102. 29 CFR 1614. 103-110, 201-606. (at 3, 18, 26)

3. The Presidential directive of July 19, 1995 to agency heads regarding the: Justice Task Force...All Agency Review of Affirmative Action Programs'' in response to the Adaranc Constructors, Inc. v. Pena decision. (at 4, 5, 29, 3, 4, 7, 8)

4. TITLE 5, UNITED STATES CODE, section 2301: Merit System Principles. (at 8, 11)

5. U.S. Department of Justice EOUSA Resource Manual: Employee Selection.

6. U.S. Office of Personnel Management, Group Coverage Qualification Standard for Administrative and Management Positions. (at 3, 9, 17-20, 22, 7)

7. The Department of the Interior's Merit Promotion and Placement Policy and the Departmental Merit Promotion Plan-Amendment of February 8, 1996. (at 11, 12, 18)